In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–30

WILLIAM A. EGAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on four counts of having willfully failed to file income tax returns, in violation of 26 U.S.C. 7203. He was sentenced to concurrent prison terms of three months on each count and fined $3,000.

The proof showed that petitioner, an attorney, had filed no federal income tax returns for the calendar years 1960 through 1967 until September 1968, after the Internal Revenue Service advised him that it was beginning an investigation of his delinquencies. It was stipulated that petitioner had sufficient income in each of the four prosecution years (1964–1967) to make

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him liable to the filing requirement (Tr. 50; Govt. Exs. 14, 15, 16).[1] Petitioner admitted on the witness stand that he had not filed the returns and that he had known that he was required to file (Tr. 67–68). He claimed that his reason for failing to do so during the prosecution years was that the returns contained a question asking whether he had filed in prior years, and that to have answered that question truthfully would have brought to light his previous failures to file, thus resulting in self-incrimination.

Petitioner had stated to Internal Revenue Service agents during their investigation that he had not been required to file returns from 1960 through 1963 because he had lost money during those years (Tr. 137); this statement, of course, was inconsistent with petitioner's self-incrimination defense with regard to failure to file for calendar year 1964. In the course of the investigation petitioner also advanced various explanations for his failure to file during the prosecution years, but he did not at that time assert a fear of self-incrimination (Tr. 143–144). The jury was instructed that it should acquit petitioner if it found that he believed he had a constitutional right not to file the returns (Tr. 283–284). The court of appeals affirmed petitioner's conviction *per curiam*.

1. Petitioner contends (Pet. 6–8) that he had an absolute right not to file tax returns because of the question in those returns asking whether he had filed for the previous year; that to have answered truthfully would have incriminated him by bringing to light

[1] "Tr." references are to the court reporter's transcript of testimony and proceedings in the district court.

his earlier delinquency; that to have answered falsely could have resulted in a perjury conviction; and, therefore, that he could not properly be required to file at all. But this argument is fully answered by *United States* v. *Sullivan,* 274 U.S. 259, where the defendant, charged with willful failure to file an income tax return, argued that in filing he would have incriminated himself. The Court unanimously rejected this argument, stating (*id.* at 263): "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." See, also, *California* v. *Byers,* 402 U.S. 424, 434.

2. Equally without substance is the argument (Pet. 8) that petitioner was deprived of due process by the district court's refusal to instruct the jury that petitioner's alleged fear of self-incrimination would itself negate the element of willfulness. In fact, the district court did charge the jury that it should acquit petitioner if it found that he believed he had a constitutional right not to file the returns (Tr. 283–284). This charge was, if anything, too lenient, for petitioner's fear of incrimination related only to the single question concerning prior returns and not to the entire return. See *United States* v. *Sullivan, supra.* In any event, the charge was not prejudicial to petitioner for the mere assertion of fear of incrimination does not, in the absence of a good faith belief in the existence of a constitutional right to withhold information, negate the element of willfulness. See *United States* v. *Murdock,* 290 U.S. 389. The evidence on

whether petitioner had such a good faith belief was conflicting, and the jury chose not to accept petitioner's testimony.

3. Finally, the record does not support the argument (Pet. 9) that the district court penalized petitioner for his reliance on the defense of self-incrimination or otherwise used improper criteria in imposing sentence. The district court's comment that the self-incrimination defense had "come up very late in the game" did not, as the court of appeals noted (Pet. App. 14), reflect antagonism toward the defense but simply referred to petitioner's previous contradictory explanations as to why he had not filed tax returns for the prosecution years. Since no improper sentencing standards were used and the sentences were within the limits prescribed by law, petitioner's sentences were correctly upheld by the court of appeals. *Gore* v. *United States*, 357 U.S. 386, 393.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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